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IN THE

Supreme Court of the United States

KNIGHT & WALL COMPANY, a Florida corporation; SPICOLA HARDWARE COMPANY, INC., a Florida corporation, YOUNKIN SPORTS SUPPLY, INC., a Florida corporation,

Petitioners,

vs.

FARRIS BRYANT, Governor of Florida, TOM ADAMS, Secretary of State, RAY E. GREEN, Comptroller, JAMES W. KYNES, Attorney General, J. EDWIN LARSON, Treasurer, THOMAS D. BAILEY, Superintendent of Public Instruction, and DOYLE E. CONNER, Commissioner of Agriculture, as and constituting the State Revenue Commission, and J. ED STRAUGHN, as Director of the State Revenue Commission,

Respondents.

CASE NO. 1002

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

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INDEX

	Page
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTE INVOLVED	3
STATEMENT	4
REASONS FOR GRANTING THE WRIT	6
CONCLUSION	18
CERTIFICATE OF SERVICE	19

CITATIONS

CASES:

	Page
Davis v. State, 146 So. 2d 898	3
Locklin v. Pridgeon, 30 So. 2d 102	9
Vallat v. Radium Dial Co., 360 Ill. 407, 196 N.E. 485, 99 A.L.R. 607	10
Husting v. Board of State Canvassers, 159 Wis. 216, 150 N.W. 542, Ann. Cas. 1916 D, 159	10
Cook v. State, 26 Ind. App. 278, 59 N.E. 489	10
Henderson v. Antonacci, 62 So. 2d 5	10
Connally v. General Construction Co., 269 U. S. 385, 46 S. Ct. 126, 70 A. L. Ed. 322	10
Winters v. New York,	L
335 U. S. 507, 68 S. Ct. 665, 92 L. Ed. 840	10
Overstreet v. Ty-Tan, Inc., 48 So. 2d 158	11
Florida National Bank of Jacksonville v. Simpson, 59 So. 2d 751	11
James v. Gerrell, 188 So. 812	18
United States v. Butler, 56 S. Ct. 312, 102 A.L.R. 914	17
STATUTES:	
Chapter 63-527, Laws of Florida	3, 4
MISCELLANEOUS:	
12 Am. Jur., Constitutional Law, Page 282, Sec. 585	9
Fla. Constitution, Declaration of Rights, Section 1 and 12	7
U. S. Constitution, Bill of Rights, Section 1	7

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

Petitioners pray that a Writ of Certiorari issue to review the opinion of the Supreme Court of the State of Florida entered in the above-entitled case on June 30, 1965.

CITATIONS TO OPINIONS BELOW

The Final Decree of the Chancellor is unreported and is part of the record on appeal. The opinion of the Supreme Court of Florida is reported in 178 So.2d 5 (Fla. 1965).

JURISDICTION

The judgment of the Supreme Court of Florida, which was entered on June 30, 1965, affirmed the judgment of the Circuit Court for Leon County, Florida, which held constitutional Chapter 63-527, Laws of Florida, known as "The Wholesale Fishing and Other Equipment Act," which levied a five per cent (5%) tax at the wholesale level generally on fishing, hunting, camping, swimming and diving equipment proposed to finance programs of the Outdoor Recreational Development Council. The Order on Petition for Rehearing was entered on September 13, 1965, and this Court ordered the extending of time to file a Petition for Writ of Certiorari to and including February 10, 1966. The jurisdiction of this Court rests on Section 1257 (3).

QUESTIONS PRESENTED

The Federal question herein involved, namely, that the aforementioned act is invalid because it contravenes and violates Section 1 of the Fourteenth Amendment to the Constitution of the United States, was raised by the Petitioners in their Complaint, and the Circuit Court of Leon County, Florida, ruled in its Order on Petition for Rehearing that it was their opinion that the statute in question did not violate the constitutional rights of the Petitioners of due process and equal protection of the law. The Supreme Court of Florida, in 178 So.2d at pages 7 and 8, ruled on the Federal question as follows:

Lastly appellants contend that the chancellor erred when he held that the act does not offend against the equal protection and due process clauses of the State and Federal Constitutions.

Obviously the objects sought to be taxed are those used in outdoor activities utilizing the natural resources of the State and the funds derived from the taxes are to be used to promote and develop those very activities by financing programs of the outdoor recreation and conservation act of 1963.

Two rules of construction should be brought into play, namely (1) all acts of the legislature are presumed valid and (2) an act should not be toppled unless it be determined invalid *beyond a reasonable doubt*. Davis v. State, 146 So.2d 892.

Indulging the presumption and relying for enlightenment upon the record, the briefs, and the opinion of the able chancellor, we conclude that we should not disturb the decree which held the Act impregnable.

STATUTE INVOLVED

The statute involved is Chapter 63-527, Laws of Florida.

STATEMENT

Petitioners are each corporations organized and existing under the Laws of the State of Florida, and each is engaged in the business of selling fishing, hunting, camping, swimming and diving equipment either at wholesale or retail, from established places of business located within the State of Florida. By Chapter 63-527, Laws of Florida, 1963 (hereinafter referred to as "ACT"), the Florida Legislature has declared in Section 4 (1) that every person is exercising a "taxable privilege who engages in the business of selling at wholesale fishing, hunting, camping, swimming and diving equipment," and further that, "For the exercise of said privilege a tax is imposed and levied," as follows:

> (a) At the rate of five per cent (5%) of the sales tax of each item of fishing, hunting, camping, swimming and diving equipment sold at wholesale in this state; the tax to be computed on gross sales for the purpose of remitting the amount of tax due the state, and to include each and every wholesale sale.
>
> (b) At the rate of five per cent (5%) of the cost price of each item of fishing, hunting, camping, swimming and diving equipment purchased, imported or caused to be imported into this state for resale unless the purchaser thereof can prove that the tax levied by this Chapter has been paid to his supply or vender.
>
> (c) At the rate of five per cent (5%) of the cost price of each item of fishing, hunting, camping, swimming or diving equipment when the same is not sold at wholesale, but is used or stored in the state."

In Section Three (3) of said Act, fishing, hunting, camping, swimming and diving equipment is defined as follows:

> "(3) Fishing, hunting, camping, swimming and diving equipment means and includes any device, implement, tool, article, or object customarily or primarily used, operated, or consumed by participants in the course of and in the furtherance of the recreational pursuit of fishing, whether in salt or fresh water and including the capturing, harvesting, or other obtaining of any creatures from or beneath waters, whether or not the same be regarded as a fish; hunting, whether of animals, birds, foul, fish, reptiles, or other creatures; camping, whether independently of or in conjunction with fishing, hunting, swimming or diving; swimming, whether in salt or fresh water, or diving, whether in salt or fresh water, including but not limited to poles, rods, reels, lines, seines, nets, tackle, tackle boxes, hooks, lures, swivels, sinkers, floats, leader wires, weights, firearms, ammunition, decoys, tents, sleeping bags, camping stoves, diving tanks, diving masks, diving lungs, diving weights and belts, diving regulators, diving suits, water skis, tow ropes, fins, bathing and swiming suits, underwater spears, spear guns, and similar, related, or like items;"

with the following proviso:

> "Provided that fuels, oils, lubricants, motors vehicles and parts thereof, boats and watercraft, motors, engines and parts for boats and watercraft, devices or articles designed or utilized primarily as life-saving, safety, or first aid equipment, and articles of clothing or apparel other than bathing, swimming, or diving suits, shall not be included within this definition."

In Section 6(f) thereof the Act also provides for further exemptions as follows:

> "This act shall not apply to nets and seines, and gear attached to or used directly in connection with same, used for commercial production of fish and other marine life, and such nets and gear are exempted from the payment of the tax herein proposed."

In Section 6 said Act provides that the administrative agency who shall administer the collection of the tax "is empowered to promulgate reasonable rules and regulations to implement and effectuate the purposes of this act," and further that the duty of enforcing the collection of the tax and all other rights and duties thereunder shall lie in the State Revenue Commission.

The Act further provides that all sums collected thereunder shall be deposited in the "the land acquisition trust fund" and that such sum so deposited "may be used for any purposes for which funds deposited . . . may lawfully be use . . . provided that not exceeding 20% of all funds collected under this act shall be used for research and capital outlay for research relating to recreational and commercial salt water fisheries and fishing."

REASONS FOR GRANTING THE WRIT

Petitioners have, and still, make the following contentions as to said Act:

1. Petitioners allege that said Act is void and inoperative because of its uncertainty. It is so incomplete, vague and indefinite that it cannot be executed. Furthermore, Petitioners, and persons similarly situated, cannot determine what the Legislature intended within

a reasonable degree of certainty. Petitioners further say that the Act is so ambiguous that to attempt to give effect to it will produce, and has already produced, resuls not contemplated by the Legislature.

2. Petitioners allege that the attempted classification of the persons and things to be taxed is unreasonable and arbitrary and does not rest on a ground of difference that has a fair and substantial relation to the object of the Legislation.

3. The exemptions in said Act are invalid because they contravene and violate Sections 1 and 12 of the Declaration of Rights of the Constitution of the State of Florida and Section 1 of the Fourteenth Amendment to the Constitution of the United States, and render said statute, as a whole, void.

4. Said Act provides for a criminal penalty against one who violates the provisions thereof and it should therefore be complete, clear and unmistakable in its terms as to what items are to be taxed.

5. Said Act is a taxing statute and as such it comes within the principle of law that statutes imposing taxes must be clear and specific. Because of the uncertainties and ambiguities of the statutes, which would embarked on a new type of taxation in Florida, as to which there are no guidelines, same is invalid and impossible to administer. Persons affected by the Act would not know if and when it applies, or to what.

6. Petitioners allege that said Act is invalid in that it amounts to an attempted expropriation of money from one group for the benefit of another and therefore does not constitute a lawful exercise of the taxing power.

7. Petitioners allege that the effect of the enforcement of said Act would be confiscatory and amount to a deprivation of property of the Petitioners, in violation of the due process and equal protection of the law clauses in the Florida and United States Constitutions.

8. That the general classification of "fishing, hunting, camping, swimming and diving equipment, . . ." unpon which the tax is to be imposed is in itself very broad because equipment used in the pursuit of fishing, hunting, camping, swimming and diving inevitably includes a great variety of items which are used in the pursuit of other activities. As to whether an endless number of items of personal property are "customarily or primarily used, operated, or consumed" in the pursuit of fishing, hunting, camping, swimming or diving is mpossible to determine and leads to the unlimited discretion of the administrative agency the power to place upon a dealer, as defined in Section 3 (2) of said Act, the duty, and the threat of criminal action if he fails to do so, to collect the tax on a great variety of items which actually may be used, operated or consumed in many other fields having no relation whatsoever to the general classification of fishing, hunting, camping, swimming and diving.

The Petitioners are Florida corporations engaged, among other things, in the business of selling at wholesale various items of merchandies or equipment that may or may not be classified as being used customarily or primarily in hunting, camping, swimming and diving. A great variety of items which are used in the pursuit of fishing, hunting, camping, swimming and diving are also used in the purusit of many other activities, and conversely, many items which are used in the pursuit of activities other than fishing, hunting, camping, swim-

ming and diving are also used at times in the pursuit of fishing, hunting camping, swimming and diving, and as to particularly all items sold which would be used in the said named activities of fishing, hunting, camping, swimming and diving it is impossible for the wholesaler or retailer of such goods to know or to determine which pursuit or activity that they will be "customarily or *primarily*" used for. There is a great mass of merchandise which might be considered as borderline items as to whether same are customarily or primarily used in the pursuit of fishing, hunting, camping, swimming and diving, and that there is no one in or out of the business of selling hardware, sporting goods, and other items of merchandise, at wholesale, or retail, who can with any degree of certainty say that same will be used customarily or primarily for such named pursuits. But based on the aforementioned, it is our feeling that the Revenue Commission or the Revenue Commissioner of the State of Florida cannot with any degree of certainty or consistency say what items are primarily and customarily used in fishing, hunting, camping, swimming and diving. Thus, no one, with or without experience in selling the said items, can with any degree of certainty or consistency classify "similar, related or like items."

The Florida Supreme Court in *Locklin v. Pridgeon,* 30 So.2d 102, in an original proceeding in habeas corpus discharged the petitioner on the ground that the statute under which he was held was invalid. The statute in question made it unlawful for a person under color of authority to do an act "not authorized by law".

The Court held:

It appears to be generally conceded that a statute, especially a penal statute, must be definite to be valid. In 12 Am. Juris., Constitutional Law, page 282, Sec. 585, it is said:

'A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.'

In *Vallat v. Radium Dial Co.*, 360 Ill. 407, 196 N.E. 485, 99 A.L.R. 607, it is held:

'Law must be complete in all its terms, and definite and certain enough to enable every person, by reading it, to know what his rights and obligations are and how the law will operate when put into execution.'

'If the enactment is so uncertain that the court is unable to determine, with any reasonable degree of certainty, what the legislature intended, or it is so incomplete that it cannot be executed, there is no other course open but to condemn it as void for uncertainty. *State ex rel. Husting v. Board of State Canvassers,* 159 Wis. 216, 150 N.W. 542, Ann. Cas. 1916D, 159.'

'Where the terms of the statute are so uncertain as to their meaning that the court cannot say with reasonable certainty what is intended, it will pronounce the enactment void *Cook v. State,* 26 Ind. App. 278, 59 N.E. 489.'

In *Henderson v. Antonacci* (1952), 62 So.2d 5, Justice Drew, in concurring with the majority in holding a "Blue Law" invalid, made the following statement:

The rule is that a statute of this kind which is so vague that men of common intelligence must guess as to its meaning or differ as to its application violates the *due process* clause under Paragraph 1 of the 14th Amendment to the Constitution of the United States and Paragraph 12 of the Declaration of Rights of the Florida Constitution. 12 Am. Jur. 282, par. 585; *Connally v. General Construction Co.,* 269 U.S. 385, 46 S. Ct. 126, 70 L. Ed. 322; *Winters v. New York,* 333 U.S. 507, 68 S. Ct. 665, 92 L. Ed. 840.

> The statute exempts from its operation 'business or concerns such as . . . tourist attractions, and concessions operated at the place of and in connection therewith, outlying grocery stores . . . drug stores . . .' (Emphasis supplied.) These descriptions of business excepted from the operation of the Act are so vague, inadequate and uncertain that no person, including the appellees, could be sure whether he was lawfully conducting one of the purported excepted businesses or not. Certainly, men of common intelligence would have to guess at what an 'outlying grocery store' was and, in this day and age, a 'Drug Store' could mean anything from a place where drugs alone are sold to one where anything from and aspirin tablet to an automobile could be purchased.

It is well recognized that tax statutes must be clear and unambiguous and must be liberally construed in favor of the taxpayer. In *Overstreet v. Ty-Tan, Inc.* (1950) 48 So.2d 158, the Florida Supreme Court held:

> A cardinal rule for construing taxing statutes requires that they impose the tax in clear and specific terms, otherwise they will be held not to impose it. Taxing statutes should be liberally construed in favor of the taxpayer. It is not within the power of taxing offices or this court to say who shall be taxed or to impose a tax on any person or class unless the Legislature in clear and specific terms authorizes the tax.

The construction placed on a tax statute by the Court is further indicated by the case of *Florida National Bank of Jacksonville v. Simpson* (1952) 59 So.2d 751, in which it was stated:

> " . . . the general rule, which is well established in this, if not in every jurisdiction, that statutes providing for taxation are to be construed strictly as against the state and in favor of the taxpayer."

The Act in question is a *taxing statute* which provides a *penalty* for failure to comply with its terms.

We submit that language of the Act is unclear in that the persons taxed have no way of knowing what is to be taxed. The statute specifies certain items, but the Revenue Commissioner has issued lists which indicate that even he is not certain of what is to be taxed. Items on these lists seem to be far outside of the scope of contemplation of the statute.

The statute attempts to levy the tax on devices, implements, tools or articles, *"customarily or primarily used, operated or consumed"* by participants *in the course of and in the furtherance of* the recreational pursuits of fishing, hunting, camping, swimming and diving. (Subsection (3) of Section 3). This is unclear and incomplete and provides no definite *standards* for taxing officials.

The Act is further uncertain and conflicting in that Section 3(2)(g) defines a *dealer* as a person who receives orders for this equipment "from consumers for use or storage in the state", while Section 3(6) defines sale at retail as sale "to a consumer" (by any person other than the manufacturer).

If the tax is to be levied by dealers, on sales at wholesale, how are we to determine whether or not a transaction between a consumer and seller is taxable in view of the above mentioned conflict?

The Act is further conflicting in that Section 4(1)(a) levies the tax on *sales at wholesale* while Section 3(7) defines "sale at wholesale" as a sale which is not a "sale at retail". In view of the fact that we are not sure what a "sale at retail" is (above), we do not know at what level the tax is being levied.

The Act is further in conflict in that Section 4(1)(a) computes the tax to include "each and every wholesale sale"; while Section 3(7) states, "provided that where the mode or method of sale or distribution of such equipment results in there being *more than one (1) sale at wholesale* prior to the sale at retail, the sale at wholesale shall be deemed to be the sale immediately preceding the sale at retail".

In the case of *James v. Gerrell,* 188 So.812, the Florida Supreme Court in declaring an excise tax on auctions invalid stated:

> The test of validity by which an excise tax will be determined is this: . . . If the objects or businesses taxed are classified, the classification must be on some reasonable basis. The tax must bear a just relation to the cost of protection. If the classification is arbitrary or the amount of the tax is such that it impairs one's rights to engage in a lawful business or unduly hampers the owner in the pursuit of his business or tends to drive large numbers out of business, it will be stricken down.

The Court here held invalid exemptions from taxation of auctioneers who operated year round while taxing other auctioneers.

We submit that there is no reasonable basis for exempting any of the items listed by the Act. Section 3(3) of the Act, after including certain specified items within the contemplation of the tax, states:

> . . . provided that fuels, oils, lubricants, motor vehicles and parts thereof, boats and watercraft, motors, engines and parts for boats and watercraft, devices or articles designed or utilized primarily as life-saving, safety, or first aid equipment, and articles of clothing or apparel other than bathing, swimming, or diving suits, shall not be included within this definition.

Section 6(3)(f) further provides:

> (f) This act shall not apply to nets and seines, and gear attached to or used directly in connection with same, used for commercial production of fish and other marine life, and such nets and gear are exempted from the payment of the tax herein proposed.

The items exempt by Section 3(3) (above) are as frequently used in the pursuance of outdoor recreation, etc., as are the items specifically taxed. There is no possible basis for exemption. Granted that most of the exempt items are already subject to another tax. However, we note that all of the items attempted to be taxed by Chapter 63-527, Laws of Florida, are also subject to the 3% sales tax under Chapter 212, Florida Statutes.

In fact, boats, watercraft and vehicles are probably utilized by outdoorsmen much more than many of the items which are specifically subject to the tax.

Likewise, we find commercial fishermen are exempt from the tax. The fact is that these are the people who will specifically benefit from the funds provided by the tax. Commercial fishermen, by Section 7 of the Act, are the one group of persons who we know are permitted to receive assistance from the funds provided by the tax in question.

The Act attempts to justify the classification by reciting in Section 1(1) the legislative finding that the "tax will be borne either by those persons benefiting directly from such increased and expanded sales, uses, and storages or by those persons directly utilizing the facilities and lands developed or acquired by virtue of the provisions of the outdoor recreation and conservation act of 1963 or otherwise directly receiving the benefits of such act."

In the declaration of legislative findings and intent (Section 1), it is stated that "outdoor recreation is vital and fundamental to the well being of the people and the economy of the state . . . ", and further that the purpose of the Act "is to impose a tax on certain sales, uses, and storages of fishing, hunting, camping, swimming and diving equipment" as is provided or defined therein. And to properly construe the Act we are first confronted with the broad field of recreation as limited to the pursuit of fishing, hunting, camping, swimming and diving. The definition of these pursuits in Section 3(3) of the Act is as follows:

> "(3) Fishing, hunting, camping, swimming, and diving *equipment* means and includes any device, implement, tool, article, or object customarily or *primarily used,* operated, or consumed by participants in the course of and in the furtherance of the *recreational* pursuit of fishing, whether in salt or fresh water and including the capturing, harvesting, or other obtaining of any creature from or beneath waters, whether or not the same be regarded as a fish; hunting, whether of animals, birds, fowl, fish, reptiles, or other creatures; camping, whether independently of or in conjunction with fishing, hunting, swimming or diving; swimming, whether in salt or fresh water, including but not limited to poles, rods, reels, lines, seines, nets, tackle, tackle boxes, hooks, lures, swivels, sinkers, floats, leader wires, weights, firearms, ammunition, decoys, tents, sleeping bags, camping stoves, diving tanks, diving masks, diving lungs, diving weights skis, tow ropes, fins, bathing and swimming suits, underwater spears, spear guns, and similar, related, or like items; *provided* that *fuels,* oils, lubricants, motor vehicles and parts thereof, boats and watercraft, motors, engines and *parts for boats* and watercraft, devices or articles designed or utilized primarily as life-saving, safety, or first aid equip-

ment, and articles of clothing or apparel other than bathing, swimming, or diving suits, *shall not be included* within this definition." (emphasis supplied)

The definition of said pursuits is in very broad language and the exemption in said section adds to the confusion and difficulty of administering said Act. It presents the additional questions as to what is meant by the terms 'fuel", "parts for boats", and devices "utilized primarily as life-saving equipment". Another serious and ambiguous part of the exemption is the question of what are "bathing, swimming, or diving suits", which the Act attempts to throw back in as taxable after exempting clothing.

While it appears that the Act in Section 3(3) above is intended to apply to items used only in recreational pursuits, a further ambiguity is created by the exemption in Section 6(3)(f), which exempts nets, seines and gear used for *commercial* fishing.

We point out the very broad and ambiguous concept of the Act because even in applying it to the items specifically named in the statute, the merchant faces these questions in determining whether to collect the tax:

1. Is the item to be used for recreational purposes?
2. Is it "equipment"?
3. Is it to be used *primarily* for fishing, hunting, camping, swimming or diving?
4. It is exempt because it is a fuel, a part for a boat, or because primarily used as life-saving equipment?

5. Is it a bathing, swimming or diving suit?

6. Is it to be used for commercial fishing?

When the Revenue Commission attempts to expand the list of taxable items to those that are "similar, related or like items", it is also first confronted with the foregoing questions. Added to a determination of these, it then faces the question of what items are similar, related and like. The guide lines are, at best, very obscure and at this point the taxing of further items is left to the judgment of the Commission. No standards whatsoever are prescribed to control the exercise of this delegated power. The Commission is not even required to hold a hearing; it is given a wide open field, unrestrained by any limitation.

We submit that the tax will not be borne equally by those benefiting if the present exemptions stand. There is no recognized basis for the classes of exemptions. It is our belief that the exemptions are arbitrary and oppressive and violate the constitutional principles of due process of law and equal protection of the law. There exists no conceivable regulatory purpose for such arbitrary classifications.

We should also note that these arbitrary exemptions also serve to violate the principle of law that moneys shall not be expropriated from one group for the benefit of another. As previously noted, the legislative findings state that the tax is to be borne by those who will benefit therefrom. However, the commercial fishermen are specifically exempt from taxation and specifically the recipients of benefits.

In the case of *United States v. Butler,* 56 S. Ct. 312, 102 A.L.R. 914, the United States Supreme Court held:

> A tax, in the general understanding of the term, and as used in the constitution, signifies that exaction for the support of . . . The word (tax) has

> never been thought to connote the expropriation of money from one group for the benefit of another. We may concede that the latter sort of imposition is constitutional when imposed to effectuate regulation of a matter in which both groups are interested in respect of which there is a power of legislative regulation. But manifestly no justification for it can be found unless as an integral part of such regulation. The exaction canot be wrested out of its setting, denominated an excise for raising revenue and legalized by ignoring its purpose as a mere instrumentality for bringing about a desired end. To do this would be to shut our eyes to what all other than we can see and understand."

We further point out that the exemptions are not based on any substantial difference in the items included and excluded. In the case of *Henderson v. Antonacci* (supra), the Court in discussing class legislation stated:

> It is necessary that there be a valid and substantial reason to make such laws operate only upon certain classes rather than generally upon all."

We see no valid reason for the classification in that all of the items taxed and all of the items exempt are of the same general class.

We respectfully point out that the statute here involved is not a general sales tax which is applied upon all transactions and uses, except those which are specifically exempted, but is a "selective sales tax" levied at the wholesale level. So far as we have been able to ascertain, it is unlike any tax levied by any State in the Union. By this statute the State of Florida is embarking into a new field with no guidelines, except of the very broadest nature.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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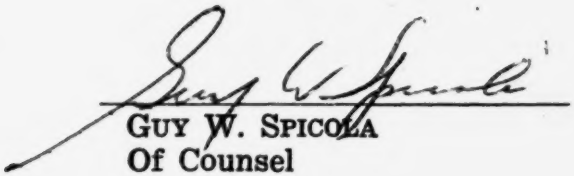
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for a writ of Ceritorari to the Supreme Court of the State of Florida has been furnished to the Attorney General and the Governor of the State of Florida, Tallahassee, Florida, by mail, this 9th day of February, 1966.



GUY W. SPICOLA
Of Counsel

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
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IN THE

SUPREME COURT OF THE UNITED STATES

No. 1002, October Term, 1965

KNIGHT & WALL COMPANY, a Florida corporation; SPICOLA HARDWARE COMPANY, INC., a Florida corporation; YOUNKIN SPORTS SUPPLY, INC., a Florida corporation,

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Respondents.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA

BRIEF OF RESPONDENTS IN OPPOSITION TO POSITION FOR WRIT OF CERTIORARI

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TOPICAL INDEX

JURISDICTION 1

QUESTIONS PRESENTED 2-3

STATUTE INVOLVED 3

STATEMENT OF THE CASE 3-4

SUMMARY 5

ARGUMENT 5-24

CONCLUSION 24

APPENDIX

APPENDIX A ..... App. 1-8

TABLE OF CITATIONS

	Page
Bailey v. Van Pelt, 78 Fla. 337, 82 So. 789, 1919	7
Board of Com'rs v. Forbes Pioneer Boat Line, 80 Fla. 252 86 So. 199, 1920, Rev'd on other grounds, 258 U.S. 338, 66 L. Ed. 647, 42 Sup. Ct. 325	25
Board of Public Instruction v. Gillespie, C. C. A., 1936, 81 F. (2d) 586	6
Brock v. Hardie, Fla., 154 So. 690, 1934, at page 695	12, 13
Campoamor v. State Live Stock Sanitary Board, 136 Fla. 451, 182 So. 277, 1938	7
Connally v. General Construction Co., 269 U. S. 385, 70 L. Ed. 322, 1925, at page 328	19
Connally v. General Construction Co., 269 U. S. 385, 70 L. Ed. 322, 1925, at page 328	19
Cotten et al., v. Co. Commissioners of Leon Co. et al., 6 Fla. 610, 1856	6, 25
Ex Parte Messer, 87 Fla. 92, 99 So. 330, 1924	25
International Harvester Co. v. Kentucky, 234 U. S. 216, 1914, 34 Sup. Ct. 853, 58 L. Ed. 1284	19, 22, 24, 25

Page

Nash v. United States, 229 U. S. 373, 1913, at page 377 23

Neisel v. Moran, 80 Fla. 98, 85 So. 346, 1919 6

Savage v. Board of Public Instruction, 101 Fla. 1362, 133 So. 341, 1931

Seaboard Air Line R. Co. v. Watson, 103 Fla. 477, 137 So. 719, app dismd 287 U. S. 86, 77 L. Ed. 180, 53 Sup. Ct. 32, 86 A.L.R. 174, 1932 24

State v. Florida State Turnpike Authority, Fla., 80 So. 2d 337, 1955 7

United States v. Ragen, 314 U.S. 513, 86 L. Ed. 383, 1941, at page 390 19

CONSTITUTIONS

	Page
Constitution of the United States Fourteenth Amendment	13, 18, 25
Constitution of the State of Florida	5

FLORIDA SESSION LAW

Chapter 63-527, laws of Florida	1, 2, 3, 4

FLORIDA STATUTES

Chapter 212, Part II	1, 2, 3, 4, 6
Section 212.52	8, 21
Section 212.52(3)	8, 9, 10, 14
Section 212.55(3)(f)	17
Section 212.58	20

IN THE

SUPREME COURT OF THE UNITED STATES

No. 1002, October Term, 1965

KNIGHT & WALL COMPANY, a Florida corporation; SPICOLA HARDWARE COMPANY, INC., a Florida corporation, YOUNKIN SPORTS SUPPLY, INC., a Florida corporation,

Petitioners

vs.

FARRIS BRYANT, Governor of Florida, TOM ADAMS, Secretary of State, RAY E. GREEN, Comptroller, JAMES W. KYNES, Attorney General, J. EDWIN LARSON, Treasurer, THOMAS D. BAILEY, Superintendent of Public Instruction, and DOYLE E. CONNER, Commissioner of Agriculture, as and constituting the State Revenue Commission, and J. ED STRAUGHN, as Director of the State Revenue Commission,

Respondents.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA

BRIEF OF RESPONDENTS IN OPPOSITION TO POSITION FOR WRIT OF CERTIORARI

JURISDICTION

Respondents accept the *facts* found under the heading "Jurisdiction" in petitioners' brief.

However, respondents would like to point out that Chapter 63-527, Laws of Florida, known as "The Wholesale Fishing and Other Equipment Act" is now found in Part II, Chapter 212, Florida Statutes.

Respondents oppose the granting of a writ of certiorari in the instant case for the reasons which will be set forth in argument.

QUESTIONS PRESENTED

Respondents accept the questions presented in petitioners' brief.

However, respondents feel that the questions presented can be better stated as follows:

QUESTION ONE

Whether or not the decision which was rendered by the Supreme Court of the State of Florida is in conflict with the principles established in prior United States Supreme Court decisions.

QUESTION TWO

Whether or not Chapter 63-527, Laws of Florida (Part II, Chapter 212, Florida Statutes) amounts to an unlawful delegation of legislative powers to the State Revenue Commission, because such powers are so vague, incomplete and uncertain that they do not afford the proper guidelines for the State Revenue Commission to follow.

QUESTION THREE

Whether or not Chapter 63-527, Laws of Florida (Part II, Chapter 212, Florida Statutes) violates the due process and equal protection of law clauses in the Florida and the United States Constitutions.

QUESTION FOUR

Whether or not Chapter 63-527, Laws of Florida, (Part II, Chapter 212, Florida Statutes) which contains a penal provision, is so vague or indefinite as to not apprise a person of his rights and obligations thereunder.

STATUTE INVOLVED

The statute involved is Chapter 63-527, Laws of Florida, now found as Part II, Chapter 212, Florida Statutes.

STATEMENT OF THE CASE

Respondents will accept the "Statement" as found in petitioners' brief, except as follows:

1. Respondents would like to point out that under (a) as found in petitioners' "Statement," the wording of the statute is as follows:

> At the rate of five percent (5%) of the sales *price* of each item of fishing, hunting, camping, swimming and diving equipment sold at wholesale in this state; the tax to be computed on gross sales for the purpose of remitting the amount of tax due the state and to include each and every wholesale sale.

Petitioners had erroneously used the word tax, rather than price.

2. Under (b) found in petitioners' "Statement," it should read as follows:

> At the rate of five percent (5%) of the cost price of each item of fishing, hunting, camping, swimming and diving equipment purchased, imported, or caused to be imported into this state for resale, unless the purchaser thereof can prove that the tax levied by Part II of this Chapter has been paid to his *supplier* or vendor.

3. Section 6 (f) as quoted at page 6 of petitioners' brief is incorporated in Part II of Chapter 212, Florida Statutes, as follows:

> "Part II of this Chapter shall not apply to nets and seines, and gear attached to or used directly in connection with same, used for commercial productions of fish and other marine life, and such nets and gear are exempted from payment of the tax herein proposed."

SUMMARY

The respondents' position taken in the following argument can be summarized in the following manner:

The respondents will show in their argument that Chapter 63-527, Laws of Florida, (Part II, Chapter 212, Florida Statutes) is not uncertain, vague, nor indefinite. Respondents will clearly show that the legislature has established definite guidelines which are to be utilized by the State

Revenue Commission in the administration of this act.

Respondents will further show in argument that the act which contains a penal provision is not so vague, indefinite, nor uncertain as to fail to apprise men of common intelligence what act or acts may constitute violation of the act. In this connection, respondents will show that the test as established in International Harvester Co. v. Kentucky, 234 U. S. 216, 1914, 34 Sup. Ct. 853, 58 L. Ed. 1284, is met.

Respondents will further show that the act is not discriminatory in any manner and that all the exemptions found therein are based upon a reasonable classification.

In connection with what has been stated in the previous three paragraphs, the respondents will show that the decision reached by the Supreme Court of the State of Florida is entirely in keeping with decisions which have been reached by the United States Supreme Court, and that the principles utilized by the Supreme Court of the State of Florida in reaching its decision are consistent with principles which have been established by the United States Supreme Court.

Respondents will show that there has been no violation of the due process and equal protection of law clauses found in the Constitutions of the United States and the State of Florida.

ARGUMENT

Respondents respectfully submit that the decision reached in this case by the Supreme Court of the State of

Florida is entirely in keeping with previous decisions reached by the United States Supreme Court covering similar situations.

Respondents further submit that the principles utilized by the Supreme Court of the State of Florida in reaching its decision are entirely consistent with principles which have previously been established by the United States Supreme Court.

Initially, it should be pointed out that the Florida Constitution is not a grant, but is a limitation on legislative power, so that the legislature may enact any law not expressly or inferentially prohibited by the constitution of the state or nation. *Cotten et al., v. Co. Commissioners of Leon Co. et al.,* 6 Fla. 610, 1856; *Savage v. Board of Public Instruction,* 101 Fla. 1362, 133 So. 341, 1931; *Neilsel v. Moran,* 80 Fla. 98, 85 So. 346, 1919; *Board of Public Instruction v. Gillespie,* C.C.A., 1936, 81 F. (2d) 586. This means that the legislature may enact any laws which are not forbidden expressly or inferentially by the Florida Constitution, so long as the requirements of due process and equal protection are met.

The right to tax, of course, is an inherent power of sovereignty. Consequently, since the Florida Constitution is a limitation of power, and since it does not expressly or inferentially say that the legislature may not impose a tax on certain sporting equipment as defined in Part II, Chapter 212, Florida Statutes, this means that so long as the requirements of due process and equal protection are met, the legislature may impose such a tax as is found in Part II, Chapter 212, Florida Statutes.

Petitioners allege that the act is so vague, incomplete and indefinite that it cannot be executed. Petitioners further state that, due to such vagueness and incompleteness, the act fails to state proper guidelines so as to clearly set forth what is to be done, by the administering agency, the State Revenue Commission.

In effect, what the petitioners are alleging on this point is that the act comprises an improper delegation of legislative authority.

While powers appertaining exclusively to the legislative department cannot be lawfully delegated, this does not mean that the legislature is wholly powerless to delegate some powers and authority to other governmental agencies. Although the legislature may not delegate the power to enact a law, or to declare what the law shall be or to exercise an unrestricted discretion in applying the law, the legislature may enact a law that is complete in itself and authorize designated officials within definite limitations to provide rules and regulations for its complete operation and enforcement. See *Bailey v. Van Pelt*, 78 Fla. 337, 82 So. 789, 1919; *State v. Florida State Turnpike Authority*, Fla., 80 So. 2d 337, 1955, at 346.

In *Campoamor v. State Live Stock Sanitary Board*, 136 Fla. 451, 182 So. 277, 1938, the Supreme Court held valid an act of the legislature delegating authority to a governmental agency to promulgate rules and regulations as were necessary to detect, control, and suppress contagious diseases of domestic animals and such rules and regulations may be remedial and penal.

Let us now apply these above stated principles to the present act in question to determine whether or not the act does supply sufficient guidelines to the State Revenue Commission within which the State Revenue Commission can effectually promulgate rules and regulations.

The respondents respectfully submit that the legislature in the act has set very definite guidelines and standards.

The petitioners have admitted that they sell fishing, hunting, camping, swimming and diving equipment.

The act commences by imposing a tax on certain sales, uses, and storages of fishing, hunting, camping, swimming and diving equipment. Here the legislature is beginning to establish its first guideline.

In Section 212.52, Florida Statutes, the delineating of guidelines continues. Therein it is stated at subsection (3): "Fishing, hunting, camping, swimming and diving equipment means and includes any device, implement, tool, article, or object customarily or primarily used, operated, or consumed by participants in the course of and in the furtherance of the recreational pursuit of fishing, . . ."

This clearly appears to further delineate definite guidelines within which the State Revenue Commission is to promulgate rules and regulations in the furtherance of the purposes as set forth within the act.

At this point, the legislature has not only used general, ordinary and everyday words, describing articles which

are to be taxed, but has gone even further by pointing out that devices, implements, tools, etc., which are *customarily or primarily* used in the furtherance of recreational pursuits are to be taxed. This appears to express very clearly that it is not items or implements which are *not* customarily or primarily used in recreational pursuits which should be taxed. By use of the words customarily or primarily, the legislature has clearly shown that it is not the incidental nor extraordinary use which is to determine its taxability. By use of the phrase, "recreational pursuit," the legislature has clearly shown that it does not intend to impose a tax on items which are used for *commercial* pursuits. This is of course entirely in keeping with the overall purpose of this tax which was to provide funds which are to be utilized in the expansion of recreational facilities within the State of Florida. However, the legislature has not stopped there in establishing guidelines which are to be followed by the State Revenue Commission.

Further in Section 212.52(3), Florida Statutes, the legislature has specifically spelled out what type items and implements are to be subject to the tax. Therein it is stated:

> ". . . lines, seines, nets, tackle, tackle boxes, hooks, lures, swivels, sinkers, floats, leader wires, weights, firearms, ammunitions, decoys, tents, sleeping bags, camping stoves, diving tanks, diving masks, diving lungs, diving weights and belts, diving regulators, diving suits, water skis, tow ropes, fins, bathing and swimming suits, underwater spears, spear guns, and similar related, or like items, . . ."

Thus we see the tremendous effort which has been exercised by the legislature in clearly circumscribing the act so that the State Revenue Commission is afforded with proper guidelines within which to promulgate rules and regulations.

The respondents respectfully submit that the legislature's efforts in clearly setting forth guidelines to be utilized by the State Revenue Commission are more than what were actually needed. The guidelines are clear. They are not vague, uncertain, nor indefinite. Not only are the general subjects to be taxed clearly set forth, but the legislature has gone even further by providing specific examples as to what similar objects and implements are to be taxed. In those situations where an item may be used for both recreational and other purposes, the legislature has clearly stated that it is the *customary* and *primary* use not the *incidental* nor *extraordinary* use which is to be the determining factor.

In this respect, it should also be remembered that the tax shall be due at the moment of the transaction. Section 212.53(3), Florida Statutes, provides:

> "The full amount of the tax on credit sales, installment sales, and sales made on any kind of deferred payment shall be due at the *moment of the transaction* in the same manner as a cash sale." (Emphasis supplied.)

This clearly rebuts one argument which has been advanced by the petitioners, since it clearly shows that the

use to which the item is *ultimately* put is *not* to be the test. Rather, the wholesaler is to determine at the moment of the transaction whether or not an item is such that is customarily or primarily used for recreational pursuits. It matters not that the item sold may be actually used for some purpose other than that for which it was customarily or primarily intended to be used. This means that the wholesaler does not have to guess how the item is actually going to be used. For instance, if a fishing pole is sold, obviously the customary or primary use of a fishing pole would be for fishing purposes. However, it is common knowledge that fishing poles are occasionally used to thrash pecans out of trees. However, the fact that the fishing pole may ultimately be used for such purpose would have no effect on the taxability or nontaxability of the item. It is the customary or primary use which is to control; not the incidental use.

Respondents respectfully submit that the act is not vague, uncertain, nor indefinite. The act does set forth very definite guidelines and standards. Consequently, there is no improper delegation of legislative authority. For the reasons which have been previously stated respondents respectfully submit that the petitioners argument that they are unable to tell on what items the tax is to be charged is without foundation. Petitioners appear to argue that since they do not know how the item will ultimately be used they are unable to determine whether or not the item is taxable. As previously pointed out, the tax is due at the moment of transaction and the ultimate use it not the test.

It is stated in *Brock v. Hardie*, Fla., 154 So. 690, 1934, at page 695:

> "It was said in Orient Ins. Co. v. Daggs, 172 U.S. 557, 19 S. Ct. 281, 43 L. Ed. 552, that it was sufficient to satisfy the demand of the Constitution if a classification was practical and not palpably arbitrary. In classifying persons and things upon whom and on which the law shall operate to include them in its privisions or exclude them therefrom the Legislature is not confined to minute consideration of the distinction which may arise from accidental circumstances. There is no precise application of the rule of reasonableness of classification. *There cannot be an exact exclusion or inclusion of persons or things.* Louisville & N. R. Co. v. Melton, 218 U.S. 36, 30 S. Ct. 676, 54 L. Ed. 921, 47 L.R.A. (N. S.) 84." (Emphasis supplied.)

Respondents respectfully submit that there cannot be an exact exclusion or inclusion of persons and things within such an act. However, the fact that there is not an exact exclusion or inclusion should certainly be no reason for declaring the entire act unconstitutional.

The act clearly sets forth definite guidelines which can be utilized by the State Revenue Commission in determining what similar or like items are to be subject to the tax.

The petitioners make a great deal over the words, *customarily* or *primarily*, as found in the act and appear to argue that they are never able to determine what is the customary or primary use of a particular item.

Respondents respectfully submit that the legislature, in enacting the act, has provided these additional *modifying* words so as to clearly apprise the petitioners and others in like position of the fact that it is not the incidental use to which an item may be put which is to determine its taxability. As previously pointed out, the act specifically enumerates certain items which are to be taxed. Respondents submit that any reasonable person with ordinary intelligence should certainly be able to determine the taxability or nontaxability of an item from the numerous criteria which have been set forth in the act itself.

The respondents respectfully submit that the act is neither vague, indefinite, nor uncertain in any manner whatsoever. Respondents further submit that the petitioners by the clear wording of the act itself are fully apprised of what items are and what items are not to be taxed.

Petitioners contend that the act violates the Fourteenth Admendment of the Federal Constitution. The basis for the petitioners' contention appears to be that there is no reasonable basis for exempting any of the items listed by the act. In effect, this attacks the reasonableness of the classification of the items which are to be taxed. In this connection, respondents respectfully point out what is stated in *Brock v. Hardie,* Fla., 154 So. 690, 1934, at page 695:

> "The Fourteenth Amendment does not strip the state of its power to exert its lawful police power. The power to classify is not taken away by the operation of the equal protection clause; therefore a

> wide scope of legislative discretion may be exerted in classifying without conflicting with the constitutional prohibition. *Magoun v. Illinois Trust & Savings Bank*, 170 U.S. 283, text 294, 18 S. Ct. 594, 42 L. Ed. 1037, text 1043."

Bearing in mind that the legislature is to be given a wide latitude in determining what items are to be taxed and what items are not to be taxed, and further keeping in mind the fundamental principle that the state constitution is a limitation of power, not a grant of power, let us now consider the act in question.

Initially we see that the legislature has determined that there is a need for taxes so as to provide funds for the enlargement of present state recreational facilities. Next we see that the legislature has determined that the brunt of such tax should be borne by persons who are most likely to receive the benefits from such enlargment of recreational facilities. This act appears to be entirely reasonable and just. The legislature has provided certain exemptions. It is these exemptions which the petitioners claim are not based upon a proper classification. Certain exemptions are found in Section 212.52(3), Florida Statutes, wherein it is stated:

> ". . . provided that fuels, oils, lubricants, motor vehicles and parts thereof, boats and watercraft, motors, engines, and parts for boats and watercraft, devices or articles designed or utilized primarily as lifesaving, safety, or first aid equipment, and articles of

clothing or apparel other than bathing, swimming, or diving suits, shall not be included within this definition."

Initially we note that fuels, oils, and lubricants are generally subject to other taxes, for instance, gasoline taxes. Next let us remember that were all fuels etc., to be taxed this would seem to be contrary to that which was previously stated in the act that it is the customary or primary use which is to determine the taxability. It would further place an unreasonable burden on one imposing the tax since there is obviously no way that a person imposing a tax can determine the ultimate use to which an object is to be put. Most fuel is, of course, utilized in motor vehicles on the highways. Therefore, should a tax have been imposed on such items, the result would have been that the incidental use of the item rather than its customary or primary use might have become a criterion. In this connection, it should also be remembered that it is items which are used for recreational pursuits which are being taxed. Consequently, it appears entirely reasonable that the legislature has seen fit to exempt fuels, oils, lubricants, motor vehicles, etc. from the burden of the tax. It should also be remembered that motor vehicles as defined by Florida law are subject to a license tax which is to be in lieu of all other property taxes. The respondents respectfully submit that the legislative determination of the classification of the items sought to be exempted from the imposition of the tax should be conclusive.

Next we note that the legislature has exempted life saving and safety equipment. This appears to be entirely

reasonable. It may well be that the legislature did not wish to burden items which were used in the saving of human lives and the advancement of the public health, public safety and public morals with the imposition of the tax. It should be pointed out that the purpose of such life saving and safety equipment is not for recreational pursuits, but is rather for the very necessary purpose of saving lives. Respondents respectfully submit that this too is a clear distinguishable and proper classification.

At first glance, it may appear that the exemption of articles of clothing or apparel other than bathing, swimming or diving suits might present some ambiguity. However, when viewed in light of other wording found in the act, no such ambiguity is manifested. It must be remembered that the tax is for the purpose of raising funds for enlarging *recreational* facilities. Most wearing apparel is worn primarily for the purpose of providing warmth and because it is a necessary custom which must be complied with in our society. Granted that certain types of wearing apparel are worn solely for sporting activities, generally wearing apparel is worn for the previously stated purposes. In this respect, we must remember that the act specifically says that it is those items which are customarily and primarily used for recreational pursuits which are to be taxed. Although some wearing apparel may *incidentally* be used in recreational pursuits, the incidental use is not the test. On the other hand, bathing, swimming and diving suits are items which are definitely customarily or primarily used in recreational pursuits. There is a

valid distinction between ordinary wearing apparel and bathing, swimming or diving suits.

Respondents respectfully submit that the exemption of the items which have been previously referred to even more clearly delineates to both the State Revenue Commission and persons situated like the petitioners what is and what is not considered as taxable.
Section 212.55(3)(f), Florida Statutes, provides:

> "Part II of this chapter shall not apply to nets and seines, and gear attached to or used directly in connection with same, used for *commercial production* of fish and other marine life, and such nets and gear are exempted from the payment of the tax herein proposed." (Emphasis supplied.)

The petitioners argue that this, too, is an improper classification and that there is no valid reason for the distinction and the exemption of said articles as described in the above cited section.

Respondents respectfully disagree. In fact, respondents submit that such exemption is entirely in keeping with the purpose of this act. It clearly exempts items whose primary and customary use would be for commercial purposes, not recreational purposes. Petitioners appear to argue that the nets, seines, and gear referred to in said section can just as well be used for recreational purposes as they can for commercial purposes. Again the respondents would like to call to the court's attention that it is the customary or primary use which is to be the test, not

the incidental or extraordinary use. Occasionally an individual may indeed purchase a three hundred foot net such as is ordinarily used by commercial fishermen and use it for recreational purposes. However, the wholesaler is not held to account for the ultimate use to which the item is put, only for its customary or primary use as determined at the moment of the transaction.

Respondents submit that contrary to what is contended by the petitioners the inclusion of this exemption actually removes ambiguity by further showing that commercial pursuits are not to be taxed. This appears to be an entirely reasonable classification on the part of the legislature.

In conclusion, the respondents would like to again point out that which has been previously cited in this brief. In classifying persons and things upon whom and on which the law shall operate to include in its provisions or exclude them therefrom, the legislature is not confined to minute consideration of the distinction which may arise from accidental circumstances. There is no precise application of the rule of reasonableness of classification.

Respondents respectfully submit that the test of the reasonableness of the classification and reasonableness of the exemptions has been met. There is no violation of the Fourteenth Amendment of the United States Constitution.

Petitioners contend that since the act contains a penal provision, the language of the act is so vague and uncertain that it does not apprise them of what act or acts will or might result in their being guilty of a misdemeanor.

The test, as set forth in *International Harvester Co. v. Kentucky*, 234 U. S. 216, 34 Sup. Ct. 853, 58 L. Ed. 1284, is:

> "A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."

In *Connally v. General Construction Co.*, 269 U. S. 385, 70 L. Ed. 322, 1925, at page 328 it is stated:

> "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, . . ."

Further in said opinion, at page 329, it is stated:

> "Nor can the question be solved by resort to the established canons of construction that enable a court to look through awkward or clumsy expression, or language wanting in precision, to the intent of the legislature."

In the case of *United States v. Ragen*, 314 U. S. 513, 86 L. Ed. 383, 1941, it is stated:

> "The mere fact that a penal statute is so framed as to require a jury upon occasion to determine a ques-

tion of reasonableness is not sufficient to make it too vague to afford a practical guide to permissible conduct."

With the above stated principles in mind, let us consider the act. A penal provision found in Section 212.58, Florida Statutes, states:

"Violation of any provision of Part II of this chapter shall constitute a misdemeanor, and shall be punished as provided by law."

The petitioners take the position that the act is so vague and uncertain that they are unable to determine what act may subject them to the punishment as provided by the act.

Initially respondents would like to point out that the language used in the act is ordinary language and is not unduly technical. Such language would even be more clear to persons, such as the petitioners herein, who admit that they are engaged every day in the wholesale business of selling the equipment referred to in the act.

The respondents would respectfully point out that the act commences by placing a tax on certain sales, uses and storages of fishing, hunting, swimming and diving equipment. The act then goes further and defines what is meant by fishing, hunting, camping, swimming and diving equipment. The act then clearly points out that it is the customary or primary use which is to determine an item's taxability. Note, too, that the words used, that is, device, implement, tool, article or object are *not* technical words. The act then goes further by specifically enumerat-

ing certain items which are to be taxed, to wit, poles, rods, reels, lines, seines, nets, tackle, tackle boxes, hooks, lures, etc. Then the act sets forth certain exemptions which are *not* to be included, to wit, fuels, oils, lubricants, motor fuels, and parts thereof . . . life saving, safety or first aid equipment, and articles of clothing or apparel other than bathing, swimming, or diving suits. The act goes yet further and points out that nets, seines and gear used in connection with commercial fishing are not to be taxed.

The act has clearly defined dealer in Section 212.52, Florida Statutes. Since the petitioners admit that they are engaged in selling at wholesale fishing, hunting, camping, swimming and diving equipment, it is respectfully submitted that the petitioners have brought themselves squarely within one of said definitions, to wit,

> "(c) Every person who sells at wholesale or offers to sell at wholesale, or who has in his possession for sale at wholesale, for use, or for storage fishing, hunting, camping, swimming and diving equipment; . . ."

The act sets forth in said Section 212.52, Florida Statutes, Definitions, what is a sale at wholesale, sale at retail, and defines sales price, storage and use. The act further clearly sets forth the rate of the tax, and the basis to which the rate is to be applied and the fact that the tax is due at the moment of the transaction. It is this act and all of these provisions which have been previously mentioned which the petitioners contend are so vague and indefinite

that men of common intelligence must guess at its meaning. Respondents respectfully submit that this contention is without foundation.

Petitioners could scarcely be heard to argue that men of common intelligence are incapable of determining what the word "fuels" means. Petitioners could scarcely be heard to argue that men of common intelligence are incapable of determining what fishing, hunting, camping, swimming and diving equipment is considered to be, particularly in light of the specific enumeration of certain items and the specific exemptions of other items which are contained in the act.

Petitioners could hardly be heard to argue that men of common intelligence are incapable of determining what a device, implement, tool, article or object is.

Consequently it appears that the test set forth in the *International Harvester Company* case, supra, has been more than adequately met.

True, where items are sold which are not specifically enumerated in the act, the wholesaler is called upon to make a determination as to the taxability of such items by reference to the criteria which are established in the act, that is, the customary and primary use is to be one criterion, recreational as opposed to commercial or vocational is to be another criterion.

However, in addition, in making this decision, he has before him, besides the specifically enumerated items which clearly indicate the type of sporting equipment

which is to be taxed, the exemptions of certain specific items which clearly set forth what is not to be taxed.

Respondents call to the court's attention that which is stated in *Nash v. United States*, 229 U. S. 373, 1913, at page 377:

> "But apart from the common law as to restraint of trade thus taken up by the statute the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here; he may incur the penalty of death. 'An act causing death may be murder, manslaughter, or misadventure according to the degree of danger attending it' by common experience in the circumstances known to the actor. 'The very meaning of the fiction of implied malice in such cases at common law was, that a man might have to answer with his life for consequences which he neither intended nor foresaw.' *Commonwealth v. Pierce*, 138 Massachusetts, 165, 178. *Commonwealth v. Chance*, 174 Massachusetts, 245, 252. 'The criterion in such cases is to examine whether common social duty would, under the circumstances, have suggested a more circumspect conduct.' 1 East P. C. 262. If a man should kill another by driving an automobile furiously into a crowd he might be convicted of murder however little he expected the result. See *Reg. v. Desmond*, and other illustrations in Stephen, Dig. Crim. Law, art 223, 1st ed., p. 146. If he did no

more than drive negligently through a street he might get off with manslaughter or less. *Reg. v. Swindall,* 2 C. & K. 230; *Rex v. Burton,* 1 Strange 481. And in the last case he might be held although he himself thought that he was acting as a prudent man should. See *The Germanic,* 196, U. S. 589, 596."

Respondents respectfully submit that the act is not vague, uncertain or indefinite. Respondents submit that the test as set forth in the *International Harvester Company* case, supra, has been met.

CONCLUSION

In conclusion, the respondents would respectfully like to call to the court's attention certain fundamental rules of construction which are of import in considering the instant case.

The State Constitution is a limitation of power, not a grant of power. Consequently all that which is not expressly prohibited by the State Constitution and which is not in conflict with the Federal Constitution is solely within the discretion of the legislative authorities. An act of the legislature should never be stricken down if there is any reasonable theory on which it can be upheld. It is the duty of the courts to so construe legislation as to save it from constitutional infirmities. *Seaboard Air Line R. Co. v. Watson,* 103 Fla. 477, 137 So. 719, app dismd, 287 U. S. 86, 77 L. Ed. 180, 53 Sup. Ct. 32, 86 A. L. R. 174, 1932.

In deference to a co-ordinate branch of the government, the judiciary should never nullify a statute except in a case free from doubt. *Cotten, et al., v. Co. Commissioners of Leon Co., et al.,* 6 Fla. 610, 1856. The presumption of constitutionality of statutes continues until the invalidity of an enactment is shown to be free from doubt or, as otherwise expressed, beyond all reasonable doubt or beyond a rational doubt. *Ex Parte Messer,* 87 Fla. 92, 99 So. 330, 1924; *Board of Com'rs v. Forbes Pioneer Boat Line,* 80 Fla. 252, 86 So. 199, 1920 Revd on other grounds, 258 U. S. 338, 66 L. Ed. 647, 42 Sup. Ct. 325.

Respondents respectfully submit that the act is not vague, uncertain or indefinite. Respondents submit that the test as set forth in the *International Harvester Company* case, supra, has been met.

Respondents submit that the act does not violate the Fourteenth Amendment of the United States Constitution that the act clearly sets forth definite guidelines to be utilized by the State Revenue Commission; that the guidelines set forth are clear and definite and not uncertain; and that the act, which contains a penal provision, does adequately apprise men of common intelligence what acts would constitute a violation of Part II of said Chapter.

Respondents further submit that the case was properly decided by the Supreme Court of the State of Florida, and that the decision is not inconsistent with decisions which have been reached by the United States Supreme Court on similar points; and that the principles utilized

by the Supreme Court of the State of Florida are principles which are consistent with those utilized by the Supreme Court of the United States.

Respondents respectfully submit that there is no need for the granting of a writ of certiorari in the instant case.

Respectfully submitted,

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KNIGHT & WALL COMPANY, a Florida corporation,
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Younkin Sports Supply, Inc., a Florida corporation
Appellants,

v.

FARRIS BRYANT, Governor of Florida,
Tom Adams, Secretary of State,
Ray E. Green, Comptroller,
James W. Kynes, Atorney General
J. Edwin Larson, Treasurer,
Thomas D. Bailey, Superintendent of Public Instruction,
and Doyle E. Conner, Commissioner of Agriculture, as
and constituting the State Revenue Commission, and
J. Ed. Straughn, as Director of the State Revenue Commission, Appellees.

No. 33660
Supreme Court of Florida.
June 30, 1965
Rehearing Denied Sept. 13, 1965

Taxpayers action challenging validity of statute levying tax on manufacturers of fishing, hunting, camping, swimming and diving equipment. The Circuit Court, Leon County, Hugh M. Taylor, J., entered decree upholding statute and taxpayers appealed. The Supreme Court Thomas, J., held that title of statute was not defective when measured against constitutional requirement that each law shall embrace but one subject and matter properly connected therewith which subject shall be briefly

expressed in the title, and that powers of Revenue Commission which would administer tax were sufficiently circumscribed by general purpose provisions.

Affirmed.

Drew, C. J., and O'Connell and Caldwell, JJ., dissented.

1. *Statutes* 47

That it would be difficult to determine what items would be within purview of statute levying tax on manufacturers of fishing, hunting, camping, swimming and diving equipment would not justify declaring law invalid. F.S.A. § 212.50 et seq.

2. *Statutes* 109.3

Titles of statutes are not required to be indices of provisions in body of act. F.S.A. Const. art. 3, § 16.

3. *Statutes* 109.1

Titles of acts must be sufficiently informative to obviate surprise or fraud that would spring from hidden provisions not indicated in title. F.S.A. Const. art. 3, § 16.

4. *Statutes* 121(1)

Title of statute levying tax on manufacturers of fishing, hunting, camping, swimming and diving equipment was not defective when measured against constitutional requirement that each law shall embrace but one subject and matter properly connected therewith which subject shall be briefly expressed in the title. F.S.A.Const. art. 3, § 16; F.S.A. § 212.50 et. seq.

5. *Constitutional Law* 60

Legislature may not delegate power to enact law or exercise unrestricted discretion in applying law.

6. *Constitutional Law* 60

Legislature may enact law designed to accomplish general public purpose and may expressly authorize designated officials within definite valid limitations to provide rules and regulations for complete operation and enforcement of law within its expressed general purpose.

7. *Licenses* 7(1)

Powers of Revenue Commission which would administer tax upon manufacturers of fishing, hunting, camping, swimming and diving equipment were sufficiently circumscribed by general purpose provisions. F.S.A. § 212.51(1).

8. *Constitutional Law* 48

All acts of Legislature are presumed valid.

9. *Constitutional Law* 48

Statute should not be toppled unless it be determined invalid beyond reasonable doubt.

10. *Constitutional Law* 230(3), 287
Licenses 7(1)

Statute levying tax on manufacturers of fishing, hunting, camping, swimming and diving equipment does not violate equal protection and due process clauses of State and Federal Constitutions. F.S.A.Const. Declaration of Rights, § 12; U.S.C.A. Const. Amend. 14.

C. DuBose Ausley of Ausley, Ausley, McMullen, O'Bryan, Michaels & McGehee, Tallahassee, for appellants.

Earl Faircloth, Atty. Gen., Sam Spector and Ira Weinstein, Asst. Attys. Gen., for appellees.

THOMAS, Justice.

This appeal comes from a decree resolving a frontal assault on Chapter 63-527, Acts of 1963, levying a tax generally on fishing, hunting, camping, swimming and diving equipment purposed to finance programs of the outdoor recreational development council. Parenthetically, one of the cases decided in the final decree, King Kole, Inc., v. Farris Bryant, Governor,* involving an attack on the title of the act so far as it relates, or does not relate, according to the point of view, to swim suits as diving equipment is now pending in this court.

The chancellor was at pains in his decree to enumerate many articles which by usage could become taxable under the act yet by a dissimilar but equally practical usage would be exempt and it is not difficult to envisage countless instruments that would be equally convenient in the

fish camp and in the home. Although the appellants challenge the law on three specific grounds predominant in the presentation of their position is the thought that there would be insurmountable difficulty in determining the taxability or "exemptibility" of myriads of articles usable in everyday life that could or might be adaptable to activities in "fishing, hunting, camping, swimming" or "diving."

(1) But the difficulty of classifying such property for tax purposes is the burden of administration and the possibility or probability that the task is fraught with difficulty would not justify the courts in declaring, for that reason, the law invalid. We think the point was well put by the chancellor when he pronounced that "difficulty to the executive or the judiciary departments of government does not justify the Courts in overthrowing or emasculating by construction the considered action of the legislature."

The appellants first assert that the title of the act is defective when measured by the requirement of Sec. 16, Art. III of the Constitution, F.S.A., that "each law * * * shall embrace but one subject and matter properly connected therewith, which subject shall be briefly expressed in the title * * *."

(2,3) In scores of decisions this court has announced what titles should contain and what titles need not contain. In general while they are not required to be indices of the provisions in the body of the Act, McCord v. Smith,

Fla., 43 So. 2d 704, they must be sufficiently informative to obviate the surprise or fraud that would spring from hidden provisions not indicated in the title. State v. Florida State Turnpike Authority, Fla., 80 So.2d 337. There is no occasion to repeat the principles now.

(4) Measured by these rules we do not find the title of Chapter 63-527 so defective that we are impelled to hold it deficient although we entertain some doubt about the terminology "swimming and diving equipment" putting a reader on notice that it encompasses bathing suits, a point presented in the King Kole case. Nevertheless it is not a doubt of such cogency that impels us to declare the law for that reason unconstitutional bound as we are to uphold the Act unless shown to be invalid beyond a reasonable doubt, a rule to which we will presently refer.

The appellants next complain that the chancellor erred when he rejected their contention that powers attempted to be vested in the Revenue Commission would constitute an unlawful delegation of legislative powers "because * * * so *vague, incomplete and uncertain*" as not to afford "proper guidelines for the administrative body to follow." (Italics supplied.)

(5, 6) We think the present act comes within the rule first enunciated in Bailey v. Van Pelt, 78 Fla. 337, 82 So. 789, and reiterated in Ex parte Lewis, 101 Fla. 624, 135 So. 147, and Stewart v. Stone, Fla., 130 So. 2d 577, that "the Legislature may not delegate the power to enact a law, or * * * to exercise an unrestricted discretion in applying a law; but it may enact a law * * designed to

accomplish a general public purpose, and may expressly authorize designated officials within definite valid limitations to provide rules and regulations for the complete operation and enforcement of the law within its expressed general purpose."

(7) The responsibilities and powers of the "Revenue Commission," mentioned in the question seem to be circumscribed by the language of the Act, the general purpose prescribed in Sec. 1, Part (1) of the Chapter and by Sec. 212, F.S.A. These appear to establish the goal toward which the legislature was directing energies and funds.

Lastly appellants contend that the chancellor erred when he held that the act does not offend against the equal protection and due process clauses of the State and Federal Constitutions.

Obviously the objects sought to be taxed are those used in outdoor activities utilizing the natural resources of the State and the funds derived from the taxes are to be used to promote and develop those very activities by financing programs of the outdoor recreation and conservation act of 1963.

(8, 9) Two rules of construction should be brought into play, namely, (1) all acts of the legislature are presumed valid and (2) an act should not be toppled unless it be determined invalid *beyond a reasonable doubt*. Davis v. State, Fla., 146 So.2d 892.

(10) Indulging the presumption and relying for enlightment upon the record, the briefs, and the opinion of the able chancellor, we conclude that we should not disturb the decree which held the Act impregnable.

Affirmed.

ROBERTS, THORNAL and HOBSON (Retired, JJ., concur.

DREW, C. J., and O'CONNELL and CALDWELL, JJ., dissent.